

## MEMBER/PUBLIC COMMENT

The State Bar of California  
180 Howard Street, San Francisco, CA 94105-1639  
<http://www.calbar.ca.gov>

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- PLEASE NOTE:** Publication for public comment is not, and shall not be construed as, a recommendation or approval by the Board of Governors of the materials published.
- SUBJECT:** Proposed New Rule 3-100 (Confidential Information of a Client) of the Rules of Professional Conduct of the State Bar of California
- BACKGROUND:** The Rules of Professional Conduct of the State Bar of California are attorney conduct rules the violation of which will subject an attorney to discipline. Pursuant to statute, rule amendment proposals may be formulated by the State Bar for approval by the Supreme Court of California.
- PROPOSAL:** Proposed new rule 3-100 has been developed in response to Assembly Bill 1101 ("AB 1101"). AB 1101 addresses the statutory duty of attorney-client confidentiality. Under this duty, an attorney is required to keep secret all confidential client information. Operative July 1, 2004, AB 1101 amends the statutory duty to include an express exception that permits, but does not require, an attorney's disclosure of certain confidential information. As amended, the statutory duty of confidentiality permits disclosure of information "to the extent that the attorney reasonably believes the disclosure is necessary to prevent a criminal act that the attorney reasonably believes is likely to result in the death of, or substantial bodily harm to, an individual." In developing this exception to attorney-client confidentiality, the Legislature determined that there are issues raised in the implementation of the exception that should be addressed by an amendment to the Rules of Professional Conduct. AB 1101 identified the following issues: (1) whether an attorney must inform a client about the attorney's ability to disclose confidential information; (2) whether an attorney must attempt to dissuade a client from committing the criminal act; and (3) whether conflicts of interest arise once an attorney determines to disclose confidential information. Proposed new rule 3-100 is intended to address these issues by establishing standards for an attorney's exercise of the new exception in a professionally responsible manner.

At its March 19, 2004 meeting, the State Bar's Board Committee on Regulation, Admissions and Discipline Oversight authorized a 60-day public comment distribution of proposed new rule 3-100. Questions about this proposal may be directed to Randall Difuntorum at (415) 538-2161.

**FISCAL/PERSONNEL IMPACT:**

There is no unbudgeted fiscal impact or personnel consequence to circulating proposed new rule 3-100 for a 60-day public comment period.

**ATTACHMENTS:**

- (1) Proposed New Rule 3-100 of the Rules of Professional Conduct of the State Bar of California
- (2) Board Committee on Regulation, Admissions & Discipline Oversight agenda item dated March 15, 2004.

**SOURCE:** Board Committee on Regulation, Admissions & Discipline Oversight

**DEADLINE:** 5:00 P.M. PST, on Monday, May 17, 2004.

**DIRECT COMMENTS TO:**

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# **ATTACHMENT 1**

## **Proposed New Rule 3-100 of the Rules of Professional Conduct of the State Bar of California**

### **Rule 3-100. Confidential Information of a Client**

- (1) A member shall not reveal information protected from disclosure by Business and Professions Code section 6068, subdivision (e)(1) without the informed consent of the client, or as provided in paragraph (B) of this rule.
- (2) A member may, but is not required to, reveal confidential information relating to the representation of a client to the extent that the member reasonably believes the disclosure is necessary to prevent a criminal act that the member reasonably believes is likely to result in death of, or substantial bodily harm to, an individual.
- (3) Before revealing confidential information to prevent a criminal act as provided in paragraph (B), a member shall, if reasonable under the circumstances:
  - (1) make a good faith effort to persuade the client: (i) not to commit or to continue the criminal act or (ii) to pursue a course of conduct that will prevent the threatened death or substantial bodily harm; or do both (i) and (ii); and
  - (2) inform the client, at an appropriate time, of the member's ability or decision to reveal information as provided in paragraph (B).
- (D) In revealing confidential information as provided in paragraph (B), the member's disclosure must be no more than is necessary to prevent the criminal act, given the information known to the member at the time of the disclosure.
- (E) A member who does not reveal information permitted by paragraph (B) does not violate this rule.

### **Discussion:**

[1] *Duty of confidentiality*. Paragraph (A) relates to a member's obligations under Business and Professions Code section 6068, subdivision (e)(1), which provides it is a duty of a member: "To maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client." A member's duty to preserve the confidentiality of client information involves public policies of paramount importance. (*In Re Jordan* (1974) 12 Cal.3d 575, 580 [116 Cal.Rptr. 371].) Preserving the confidentiality of client information contributes to the trust that is the hallmark of the client-lawyer relationship. The

client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld. Paragraph (A) thus recognizes a fundamental principle in the client-lawyer relationship, that, in the absence of the client's informed consent, a member must not reveal information relating to the representation. (See, e.g., *Commercial Standard Title Co. v. Superior Court* (1979) 92 Cal.App.3d 934, 945 [155 Cal.Rptr.393].)

[2] *Client-lawyer confidentiality encompasses the attorney-client privilege, the work-product doctrine and ethical standards of confidentiality.* The principle of client-lawyer confidentiality applies to information relating to the representation, whatever its source, and encompasses matters communicated in confidence by the client, and therefore protected by the attorney-client privilege, matters protected by the work product doctrine, and matters protected under ethical standards of confidentiality, all as established in law, rule and policy. (See *In the Matter of Johnson* (Rev. Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179; *Goldstein v. Lees* (1975) 46 Cal.3d 614, 621 [120 Cal. Rptr. 253].) The attorney-client privilege and work-product doctrine apply in judicial and other proceedings in which a member may be called as a witness or be otherwise compelled to produce evidence concerning a client. A member's ethical duty of confidentiality is not so limited in its scope of protection for the client-lawyer relationship of trust and prevents a member from revealing the client's confidential information even when not confronted with such compulsion. Thus, a member may not reveal such information except with the consent of the client or as authorized or required by the State Bar Act, these rules, or other law.

[3] *Narrow exception to duty of confidentiality under this Rule.* Notwithstanding the important public policies promoted by lawyers adhering to the core duty of confidentiality, the overriding value of life permits disclosures otherwise prohibited under Business & Professions Code section 6068(e), subdivision (1). Paragraph (B), which restates Business and Professions Code section 6068, subdivision (e)(2), identifies a narrow exception, absent the client's informed consent, to the member's duty not to reveal confidential information when a member reasonably believes that a future or ongoing criminal act is likely to result in the death of, or substantial bodily harm to an individual. A member is not permitted to reveal confidential information concerning a client's past, completed criminal acts. Evidence Code section 956.5, which relates to the evidentiary attorney-client privilege, sets forth a similar express exception.

[4] *Member not subject to discipline for revealing confidential information as permitted under this Rule.* Rule 3-100, which restates Business and Professions Code section 6068, subdivision (e)(2), reflects a balancing between the interests of preserving client confidentiality and of preventing a criminal act that a member reasonably believes is likely to result in death or substantial bodily harm to another. A member who reveals information as permitted under this rule is not subject to discipline.

[5] *No duty to reveal confidential information.* Neither Business and Professions Code section 6068, subdivision (e)(2) nor this rule imposes an affirmative obligation on a member to reveal information in order to prevent harm. (See rule 1-100(A).) A member may decide not to reveal confidential information. Whether a member chooses to reveal confidential information as permitted under this rule is a matter for the individual member to decide.

[6] *Deciding to reveal confidential information as permitted under paragraph (B).* Disclosure permitted under paragraph (B) is ordinarily a last resort, when no other available action is reasonably likely to prevent the criminal act. Prior to revealing information as permitted under paragraph (B), the member must, if reasonable under the circumstances, make a good faith effort to persuade the client to take steps to avoid the criminal act or threatened harm. Among the factors to be considered in determining whether to disclose confidential information are the following:

- (1) the amount of time that the member has to make a decision about disclosure;
- (2) whether the client or a third party has made similar threats before and whether they have ever acted or attempted to act upon them;
- (3) whether the member believes the member's efforts to persuade the client or a third person not to engage in the criminal conduct have or have not been successful;
- (4) the extent of adverse effect to the client's rights under the Fifth, Sixth and Fourteenth Amendments of the United States Constitution and analogous rights and privacy rights under Article 1 of the Constitution of the State of California that may result from disclosure contemplated by the member;
- (5) the extent of other adverse effects to the client that may result from disclosure contemplated by the member; and
- (6) the nature and extent of information that must be disclosed to prevent the criminal act or threatened harm.

A member may also consider whether the prospective harm to the victim or victims is imminent in deciding whether to disclose the confidential information. However, the imminence of the harm is not a prerequisite to disclosure and a member may disclose the information without waiting until immediately before the harm is likely to occur. Thus, a member who knows that a client has discharged toxic waste into a town's water supply in

violation of the criminal law may reveal this information to the authorities if there is a present and substantial risk that a person who drinks the water will contract a life-threatening or debilitating disease and the member's disclosure is necessary to eliminate the threat or reduce the number of victims.

[7] *Counseling client or third person not to commit a criminal act reasonably likely to result in death of substantial bodily harm.* Subparagraph (C)(1) provides that before a member may reveal confidential information, the member must, if reasonable under the circumstances, make a good faith effort to persuade the client not to commit or to continue the criminal act, or to persuade the client to otherwise pursue a course of conduct that will prevent the threatened death or substantial bodily harm, or if necessary, do both. The interests protected by such counseling is the client's interest in limiting disclosure of confidential information and in taking responsible action to deal with situations attributable to the client. If a client, whether in response to the member's counseling or otherwise, takes corrective action – such as by ceasing the criminal act before harm is caused – disclosure by the member would not be necessary and therefore would not be permissible. When the actor is a nonclient or when the act is deliberate or malicious, the member who contemplates making adverse disclosure of confidential information may reasonably conclude that the compelling interests of the member or others in their own personal safety preclude personal contact with the actor. Before counseling an actor who is a nonclient, the member should, if reasonable under the circumstances, first advise the client of the member's intended course of action. If a client or another person has already acted but the intended harm has not yet occurred, the member should consider, if reasonable under the circumstances, efforts to persuade the client or third person to warn the victim or consider other appropriate action to prevent the criminal act. Even when the member has concluded that paragraph (B) does not permit the member to reveal confidential information, the member nevertheless is permitted to counsel the client as to why it may be in the client's best interest to consent to the attorney's disclosure of that information.

[8] *Disclosure of confidential information must be no more than is reasonably necessary to prevent the criminal act.* Under paragraph (D), disclosure of confidential information, when made, must be no more extensive than the member reasonably believes necessary to prevent the criminal act. Disclosure should allow access to the confidential information to only those persons who the member reasonably believes can act to prevent the harm. Under some circumstances, a member may determine that the best course to pursue is to make an anonymous disclosure to the potential victim or relevant law-enforcement authorities. What particular measures are reasonable depends on the circumstances known to the member. Relevant circumstances include the time available, whether the victim might be unaware of the threat, the member's prior course of dealings with the client, and the extent of the adverse effect on the client that may result from the disclosure contemplated by the member.

[9] *Informing client of member's ability or decision to reveal confidential information under subparagraph (C)(2).* A member is required to keep a client reasonably informed about significant developments regarding the employment or representation. Rule 3-500; Business and Professions Code, section 6068, subdivision (m). Paragraph (C)(2), however, recognizes that under certain circumstances, informing a client of the member's ability or decision to reveal confidential information under paragraph (B) would likely increase the risk of death or substantial bodily harm, not only to the originally-intended victims of the criminal act, but also to the client or members of the client's family, or to the member or the member's family or associates. Therefore, paragraph (C)(2) requires a member to inform the client of the member's ability or decision to reveal confidential information as provided in paragraph (B) only if it is reasonable to do so under the circumstances. Paragraph (C)(2) further recognizes that the appropriate time for the member to inform the client may vary depending upon the circumstances. (See paragraph [10] of this discussion.) Among the factors to be considered in determining an appropriate time, if any, to inform a client are:

- (1) whether the client is an experienced user of legal services;
- (2) the frequency of the member's contact with the client;
- (3) the nature and length of the professional relationship with the client;
- (4) whether the member has provided information to, or received information from, the client at the outset of representation or anytime during the representation concerning attorney-client confidentiality or any limits on confidentiality;
- (5) the likelihood that the client's matter will involve information within paragraph (B);
- (6) the member's belief that so informing the client is likely to increase the likelihood that a criminal act likely to result in the death of, or substantial bodily harm to, an individual; and
- (7) the member's belief that good faith efforts to persuade a client not to act on a threat have failed.

[10] *Avoiding a chilling effect on the lawyer-client relationship.* The foregoing flexible approach to the member's informing a client of his or her ability or decision to reveal confidential information recognizes the concern that informing a client about limits on confidentiality may have a chilling effect on client communication. (See Discussion paragraph [1].) To avoid that chilling effect, one member may choose to inform the client of the member's ability to reveal information as early as the outset of the representation, while another member may choose to inform a client only at a point when that client has imparted information that may fall under paragraph (B), or even choose not to inform a client until such time as the member attempts to counsel the client as contemplated in Discussion paragraph [7]. In each situation, the member will have discharged properly the requirement under subparagraph (C)(2), and will not be subject to discipline.

[11] *Informing client that disclosure has been made; termination of the lawyer-client relationship.* When a member has revealed confidential information under paragraph (B), in all but extraordinary cases the relationship between member and client will have deteriorated so as to make the member's representation of the client impossible. Therefore, the member is required to seek to withdraw from the representation (see rule 3-700(B)), unless the member is able to obtain the client's informed consent to the member's continued representation. The member must inform the client of the fact of the member's disclosure unless the member has a compelling interest in not informing the client, such as to protect the member, the member's family or a third person from the risk of death or substantial bodily harm.

[12] *Other Consequences of the member's disclosure.* Depending upon the circumstances of a member's disclosure of confidential information, there may be other important issues that a member must address. For example, if a member will be called as a witness in the client's matter, then rule 5-210 should be considered. Similarly, the member should consider his or her duties of loyalty and competency (rule 3-110).

[13] *Other exceptions to confidentiality under California law.* Rule 3-100 is not intended to augment, diminish, or preclude reliance upon, any other exceptions to the duty to preserve the confidentiality of client information recognized under California law.



## **ATTACHMENT 2**

RAD Open Agenda Item - MARCH 19, 2004  
Proposed New Rule 3-100, Rules of  
Professional Conduct of the State Bar of  
California - Request for Public Comment,  
Supplemental Agenda Item

**DATE:** March 15, 2004

**TO:** Members of the Board Committee on Regulation, Admissions & Discipline Oversight

**FROM:** Randall Difuntorum, Director, Professional Competence

**RE:** Proposed New Rule 3-100, Rules of Professional Conduct of the State Bar of California - Request for Public Comment

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### **EXECUTIVE SUMMARY**

Proposed new rule 3-100 was developed by the State Bar AB 1101 Advisory Task Force and responds to a legislative mandate for State Bar consideration of a proposed new Rule of Professional Conduct addressing an exception to attorney's duty of confidentiality. Operative July 1, 2004, AB 1101 amends the statutory duty of confidentiality to permit an attorney to reveal confidential information to prevent a criminal act that is likely to result in the death of, or substantial bodily harm to, an individual. Proposed rule 3-100 addresses three issues identified by the legislature in AB 1101: (1) whether an attorney must inform a client about the attorney's discretion to disclose confidential information; (2) whether an attorney must attempt to dissuade a client from committing the criminal act as a prerequisite to revealing confidential information; and (3) whether conflicts of interest issues arise once an attorney elects to disclose confidential information. This agenda item seeks the Board Committee's authorization to release proposed new rule 3-100 for a 60-day public comment period.

### **SUBJECT:**

Circulation for public comment of proposed new rule 3-100 of the Rules of Professional Conduct of the State Bar of California. Proposed new rule 3-100 is provided as Attachment One.

**BACKGROUND:**

The Rules of Professional Conduct are attorney conduct rules the violation of which will subject an attorney to discipline. Pursuant to statute, the State Bar of California has the authority to formulate amendments to the Rules of Professional Conduct. (Bus. & Prof. Code sec. 6076.) Amendments adopted by the State Bar are submitted to the Supreme Court for approval. When approved by the Supreme Court, the amendments are binding upon all members of the State Bar. (Bus. & Prof. Code sec. 6077.)

In California, an attorney's duty of confidentiality is codified in statute. Business and Professions Code section 6068, subdivision (e) provides that it is a duty of an attorney "to maintain inviolate the confidence and, at every peril to himself or herself, to preserve the secrets of his or her client." Operative July 1, 2004, AB 1101 amends this statute to permit, but not require, an attorney to reveal a client's confidential information to prevent a criminal act that is likely to result in the death of, or substantial bodily harm to, an individual. (The chaptered version of AB 1101 is provided as Attachment Two.) In enacting AB 1101, the legislature recognized that a Rule of Professional Conduct could be adopted to address various issues relating to the implementation of the new exception. Accordingly, section 3 of AB 1101, an uncodified portion of the bill, states:

*SEC. 3. (a) It is the intent of the Legislature that the President of the State Bar shall, upon consultation with the Supreme Court, appoint an advisory task force to study and make recommendations for a rule of professional conduct regarding professional responsibility issues related to the implementation of this act.*

*(b) The task force should consider the following issues:*

*(1) Whether an attorney must inform a client or a prospective client about the attorney's discretion to reveal the client's or prospective client's confidential information to the extent that the attorney reasonably believes that the disclosure is necessary to prevent a criminal act that the attorney reasonably believes is likely to result in the death of, or substantial bodily harm to, an individual.*

*(2) Whether an attorney must attempt to dissuade the client from committing the perceived criminal conduct prior to revealing the client's confidential information, and how those conflicts might be avoided or minimized.*

*(3) Whether conflict-of-interest issues between the attorney and client arise once the attorney elects to disclose the client's confidential information, and how those conflicts might be avoided or minimized.*

*(4) Other similar issues that are directly related to the disclosure of confidential information permitted by this act.*

*(c) Members of the task force shall include the following:*

*(1) Civil and criminal law practitioners, including criminal defense practitioners.*

*(2) Representatives from the judicial, executive, and legislative branches.*

*(3) Representatives from the State Bar Commission for the Revision of the Rules of Professional Conduct and from the State Bar Committee on Professional Responsibility and Conduct.*

In accordance with AB 1101, an advisory task force was appointed and conducted four day-long meetings to study the issues presented and to draft a proposed new rule. A roster of the members of the task force is provided as Attachment Three. At its meeting on March 12, 2004, the task force recommended that proposed rule 3-100, as set forth in Attachment One, be submitted to the Board Committee with a request that the rule be released for public comment. The Office of Professional Competence has reviewed the proposed rule and concurs in the recommendation to release the rule for public comment.

***SUMMARY OF PROPOSAL:***

In general, the development of proposed new 3-100 has drawn upon the following resources: prior versions of rule 3-100 adopted by the State Bar; American Bar Association Model Rule of Professional Conduct 1.6; and the American Law Institute's Restatement of the Law, the Law Governing Lawyers, Third Edition. The objective of the drafting process was to develop a rule that facilitated a attorney's exercise of discretion under the new permissive death or substantial bodily harm confidentiality exception in a professionally responsible manner. The Task Force sought to draft a rule that would effectuate the public policies favoring the preservation of life and protection of the public, while at the same time provide guidance to lawyers about how, where feasible, to achieve those goals within the confines of the attorney-client relationship. For the most part, the study and drafting process focused on the issues identified in AB 1101. A summary of proposed rule is provided below.

***SUMMARY OF PROPOSED NEW RULE 3-100:***

Paragraph (A) of the rule incorporates by reference the statutory duty of confidentiality found in the Business and Professions Code. Paragraph (A) also identifies two exceptions to the duty of confidentiality: informed consent of the client to reveal confidential information; and disclosure of confidential information under paragraph (B) of the rule. The first five paragraphs of the rule discussion clarify the scope of the duty of confidentiality and the balanced policy of allowing a limited exception to prevent a criminal act likely to result in death or substantial bodily harm. In particular, the fourth paragraph of the discussion section states that an attorney is not subject to discipline for revealing confidential information in accordance with the terms of the rule and Business and Professions Code section 6068, subdivision (e)(2).

Paragraph (B) of the rule restates the statutory language of the new exception §6068(e)(2) that permits, but does not require, disclosure of confidential information to prevent a criminal act likely to result in death or substantial bodily harm. The language used in paragraph (B) is identical to the exception language used in Business and Professions Code section 6068, subdivision (e) (2), as operative on July 1, 2004. The factors to be considered by an attorney in making a decision to disclose are set forth in the sixth paragraph of the rule discussion section.

Paragraph (C) of the rule identifies two steps that an attorney must consider before exercising discretion to reveal confidential information to prevent a criminal act of death/substantial bodily harm. Subparagraph (C)(1) states that an attorney must, if reasonable under the circumstances, attempt to persuade the client (i) not to commit or to continue the criminal act, (ii) to otherwise pursue a course of conduct that will prevent the

threatened death/substantial bodily harm, or, if necessary, do both. The seventh paragraph of the discussion section clarifies that if this remonstrance with the client is successful in preventing the threatened harm, then disclosure of confidential information is not necessary and therefore not permitted. Subparagraph (C)(2) states that an attorney must, if reasonable under the circumstances, inform the client, at an appropriate time, of the attorney's ability (or if reached, the attorney's decision) to reveal information to prevent a criminal act likely to result in death or substantial bodily harm. The ninth paragraph of the discussion section sets forth factors to be considered in determining an appropriate time to inform a client, and the tenth paragraph of the discussion explains that this flexible "factor analysis" approach is intended to avoid, where possible, chilling the relationship of trust between client and attorney that is essential to effective legal representation.

Paragraph (D) of the rule states that disclosure of confidential information under the rule must be no more than is necessary to prevent the criminal act, given the information known to the attorney at the time of the disclosure. The eighth paragraph of the discussion section elaborates on this requirement and also clarifies that in some circumstances, an attorney may decide that the best course to pursue is to make an anonymous tip to law enforcement agencies or potential victims.

Paragraph (E) of the rule states that an attorney who does not reveal confidential information permitted under the limited exception does not violate the rule. The fifth paragraph of the discussion section explains that revealing confidential information to prevent a criminal act likely to result in death or substantial bodily harm is a matter for the individual attorney to decide.

Other matters addressed in the discussion section include: an attorney's consideration of the "imminence" of harm as a factor to consider in deciding to reveal confidential information, but not a prerequisite to disclosure; clarification that the scope of the limited exception applies to future or ongoing crimes; and identification of other consequences to the attorney-client relationship once an attorney discloses confidential information under the limited exception.

Regarding other consequences to the attorney-client relationship once an attorney discloses confidential information, the discussion identifies the following issues of concern and relevant Rules of Professional Conduct: mandatory withdrawal under rule 3-700; attorney acting as witness in the client's case under rule 5-210; the obligation to perform legal services with competence under rule 3-110; and the common law duty of loyalty.

A representative of the Task Force will be available on March 19, 2004 to answer Board Committee questions about the proposed rule.

***LENGTH OF PUBLIC COMMENT PERIOD:***

As the operative date of amended Business and Professions Code section 6068, subdivision (e) is July 1, 2004, it is requested that the public comment period be set for 60-days. This time-frame allows staff an opportunity to present a recommendation for action on the rule following public comment, on a back-to-back basis, to the Board Committee and the Board at the Board's May 21-22, 2004 meeting. If the rule is adopted

by the Board, staff will submit the rule to the Supreme Court for approval promptly after the Board's May meeting.

***EFFECTIVE DATE OF PROPOSAL:***

Amendments to the Rules of Professional Conduct require Supreme Court approval. Ordinarily, a rule amendment becomes operative 30-days after the order approving the amendment is issued. However, given the July 1, 2004 AB 1101 operative date of AB 1101, staff anticipates recommending that if the Supreme Court decides to approve the new rule, that it also consider issuing an order stating the new rule becomes operative "forthwith," that is, as of the day of the order itself.

***FISCAL AND PERSONNEL IMPACT:***

There is no unbudgeted fiscal impact or personnel consequence to circulating proposed rule 3-100 for a 60-day public comment period.

***BOARD COMMITTEE RECOMMENDATION:***

The AB 1101 Advisory Task Force and the Office of Professional Competence recommends that the Board Committee authorize the circulation of proposed new rule 3-100 of the Rules of Professional Conduct for a 60-day public comment period.

***PROPOSED BOARD COMMITTEE RESOLUTION:***

Should the Board Committee on Regulation, Admissions and Discipline agree with the proposed recommendation, adoption of the following resolution would be appropriate.

**RESOLVED**, that the Board Committee on Regulation, Admissions and Discipline Oversight authorizes staff to make available for public comment for a period of 60-days, proposed new rule 3-100 of the Rules of Professional Conduct of the State Bar of California, in the form attached; and it is

**FURTHER RESOLVED**, that this authorization for release for public comment is not, and shall not be construed as, a statement or recommendation of approval of the proposed item.

**Proposed New Rule 3-100 of the Rules of Professional  
Conduct of the State Bar of California**

**Rule 3-100: Confidential Information of a Client**

- (1) A member shall not reveal information protected from disclosure by Business and Professions Code section 6068, subdivision (e)(1) without the informed consent of the client, or as provided in paragraph (B) of this rule.
- (2) A member may, but is not required to, reveal confidential information relating to the representation of a client to the extent that the member reasonably believes the disclosure is necessary to prevent a criminal act that the member reasonably believes is likely to result in death of, or substantial bodily harm to, an individual.
- (3) Before revealing confidential information to prevent a criminal act as provided in paragraph (B), a member shall, if reasonable under the circumstances:
  - (1) make a good faith effort to persuade the client: (i) not to commit or to continue the criminal act or (ii) to pursue a course of conduct that will prevent the threatened death or substantial bodily harm; or do both (i) and (ii); and
  - (2) inform the client, at an appropriate time, of the member's ability or decision to reveal information as provided in paragraph (B).
- (D) In revealing confidential information as provided in paragraph (B), the member's disclosure must be no more than is necessary to prevent the criminal act, given the information known to the member at the time of the disclosure.
- (E) A member who does not reveal information permitted by paragraph (B) does not violate this rule.

**Discussion:**

[1] *Duty of confidentiality.* Paragraph (A) relates to a member's obligations under Business and Professions Code section 6068, subdivision (e)(1), which provides it is a duty of a member: "To maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client." A member's duty to preserve the confidentiality of client information involves public policies of paramount importance. (*In Re Jordan* (1974) 12 Cal.3d 575, 580 [116 Cal.Rptr. 371].) Preserving the confidentiality of client information contributes to the trust that is the hallmark of the client-lawyer relationship. The

client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld. Paragraph (A) thus recognizes a fundamental principle in the client-lawyer relationship, that, in the absence of the client's informed consent, a member must not reveal information relating to the representation. (See, e.g., *Commercial Standard Title Co. v. Superior Court* (1979) 92 Cal.App.3d 934, 945 [155 Cal.Rptr.393].)

[2] *Client-lawyer confidentiality encompasses the attorney-client privilege, the work-product doctrine and ethical standards of confidentiality.* The principle of client-lawyer confidentiality applies to information relating to the representation, whatever its source, and encompasses matters communicated in confidence by the client, and therefore protected by the attorney-client privilege, matters protected by the work product doctrine, and matters protected under ethical standards of confidentiality, all as established in law, rule and policy. (See *In the Matter of Johnson* (Rev. Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179; *Goldstein v. Lees* (1975) 46 Cal.3d 614, 621 [120 Cal. Rptr. 253].) The attorney-client privilege and work-product doctrine apply in judicial and other proceedings in which a member may be called as a witness or be otherwise compelled to produce evidence concerning a client. A member's ethical duty of confidentiality is not so limited in its scope of protection for the client-lawyer relationship of trust and prevents a member from revealing the client's confidential information even when not confronted with such compulsion. Thus, a member may not reveal such information except with the consent of the client or as authorized or required by the State Bar Act, these rules, or other law.

[3] *Narrow exception to duty of confidentiality under this Rule.* Notwithstanding the important public policies promoted by lawyers adhering to the core duty of confidentiality, the overriding value of life permits disclosures otherwise prohibited under Business & Professions Code section 6068(e), subdivision (1). Paragraph (B), which restates Business and Professions Code section 6068, subdivision (e)(2), identifies a narrow exception, absent the client's informed consent, to the member's duty not to reveal confidential information when a member reasonably believes that a future or ongoing criminal act is likely to result in the death of, or substantial bodily harm to an individual. A member is not permitted to reveal confidential information concerning a client's past, completed criminal acts. Evidence Code section 956.5, which relates to the evidentiary attorney-client privilege, sets forth a similar express exception.

[4] *Member not subject to discipline for revealing confidential information as permitted under this Rule.* Rule 3-100, which restates Business and Professions Code section 6068,

subdivision (e)(2), reflects a balancing between the interests of preserving client confidentiality and of preventing a criminal act that a member reasonably believes is likely to result in death or substantial bodily harm to another. A member who reveals information as permitted under this rule is not subject to discipline.

[5] *No duty to reveal confidential information.* Neither Business and Professions Code section 6068, subdivision (e)(2) nor this rule imposes an affirmative obligation on a member to reveal information in order to prevent harm. (See rule 1-100(A).) A member may decide not to reveal confidential information. Whether a member chooses to reveal confidential information as permitted under this rule is a matter for the individual member to decide.

[6] *Deciding to reveal confidential information as permitted under paragraph (B).* Disclosure permitted under paragraph (B) is ordinarily a last resort, when no other available action is reasonably likely to prevent the criminal act. Prior to revealing information as permitted under paragraph (B), the member must, if reasonable under the circumstances, make a good faith effort to persuade the client to take steps to avoid the criminal act or threatened harm. Among the factors to be considered in determining whether to disclose confidential information are the following:

- (1) the amount of time that the member has to make a decision about disclosure;
- (2) whether the client or a third party has made similar threats before and whether they have ever acted or attempted to act upon them;
- (3) whether the member believes the member's efforts to persuade the client or a third person not to engage in the criminal conduct have or have not been successful;
- (4) the extent of adverse effect to the client's rights under the Fifth, Sixth and Fourteenth Amendments of the United States Constitution and analogous rights and privacy rights under Article 1 of the Constitution of the State of California that may result from disclosure contemplated by the member;
- (5) the extent of other adverse effects to the client that may result from disclosure contemplated by the member; and
- (6) the nature and extent of information that must be disclosed to prevent the criminal act or threatened harm.

A member may also consider whether the prospective harm to the victim or victims is imminent in deciding whether to disclose the confidential information. However, the imminence of the harm is not a prerequisite to disclosure and a member may disclose the information without waiting until immediately before the harm is likely to occur. Thus, a member who knows that a client has discharged toxic waste into a town's water supply in violation of the criminal law may reveal this information to the authorities if there is a present and substantial risk that a person who drinks the water will contract a life-threatening



or debilitating disease and the member's disclosure is necessary to eliminate the threat or reduce the number of victims.

[7] *Counseling client or third person not to commit a criminal act reasonably likely to result in death of substantial bodily harm.* Subparagraph (C)(1) provides that before a member may reveal confidential information, the member must, if reasonable under the circumstances, make a good faith effort to persuade the client not to commit or to continue the criminal act, or to persuade the client to otherwise pursue a course of conduct that will prevent the threatened death or substantial bodily harm, or if necessary, do both. The interests protected by such counseling is the client's interest in limiting disclosure of confidential information and in taking responsible action to deal with situations attributable to the client. If a client, whether in response to the member's counseling or otherwise, takes corrective action – such as by ceasing the criminal act before harm is caused – disclosure by the member would not be necessary and therefore would not be permissible. When the actor is a nonclient or when the act is deliberate or malicious, the member who contemplates making adverse disclosure of confidential information may reasonably conclude that the compelling interests of the member or others in their own personal safety preclude personal contact with the actor. Before counseling an actor who is a nonclient, the member should, if reasonable under the circumstances, first advise the client of the member's intended course of action. If a client or another person has already acted but the intended harm has not yet occurred, the member should consider, if reasonable under the circumstances, efforts to persuade the client or third person to warn the victim or consider other appropriate action to prevent the criminal act. Even when the member has concluded that paragraph (B) does not permit the member to reveal confidential information, the member nevertheless is permitted to counsel the client as to why it may be in the client's best interest to consent to the attorney's disclosure of that information.

[8] *Disclosure of confidential information must be no more than is reasonably necessary to prevent the criminal act.* Under paragraph (D), disclosure of confidential information, when made, must be no more extensive than the member reasonably believes necessary to prevent the criminal act. Disclosure should allow access to the confidential information to only those persons who the member reasonably believes can act to prevent the harm. Under some circumstances, a member may determine that the best course to pursue is to make an anonymous disclosure to the potential victim or relevant law-enforcement authorities. What particular measures are reasonable depends on the circumstances known to the member. Relevant circumstances include the time available, whether the victim might be unaware of the threat, the member's prior course of dealings with the client, and the extent of the adverse effect on the client that may result from the disclosure contemplated by the member.

[9] *Informing client of member's ability or decision to reveal confidential information under subparagraph (C)(2).* A member is required to keep a client reasonably informed about significant developments regarding the employment or representation. Rule 3-500; Business

and Professions Code, section 6068, subdivision (m). Paragraph (C)(2), however, recognizes that under certain circumstances, informing a client of the member's ability or decision to reveal confidential information under paragraph (B) would likely increase the risk of death or substantial bodily harm, not only to the originally-intended victims of the criminal act, but also to the client or members of the client's family, or to the member or the member's family or associates. Therefore, paragraph (C)(2) requires a member to inform the client of the member's ability or decision to reveal confidential information as provided in paragraph (B) only if it is reasonable to do so under the circumstances. Paragraph (C)(2) further recognizes that the appropriate time for the member to inform the client may vary depending upon the circumstances. (See paragraph [10] of this discussion.) Among the factors to be considered in determining an appropriate time, if any, to inform a client are:

- (1) whether the client is an experienced user of legal services;
- (2) the frequency of the member's contact with the client;
- (3) the nature and length of the professional relationship with the client;
- (4) whether the member has provided information to, or received information from, the client at the outset of representation or anytime during the representation concerning attorney-client confidentiality or any limits on confidentiality;
- (5) the likelihood that the client's matter will involve information within paragraph (B);
- (6) the member's belief that so informing the client is likely to increase the likelihood that a criminal act likely to result in the death of, or substantial bodily harm to, an individual; and
- (7) the member's belief that good faith efforts to persuade a client not to act on a threat have failed.

[10] *Avoiding a chilling effect on the lawyer-client relationship.* The foregoing flexible approach to the member's informing a client of his or her ability or decision to reveal confidential information recognizes the concern that informing a client about limits on confidentiality may have a chilling effect on client communication. (See Discussion paragraph [1].) To avoid that chilling effect, one member may choose to inform the client of the member's ability to reveal information as early as the outset of the representation, while another member may choose to inform a client only at a point when that client has imparted information that may fall under paragraph (B), or even choose not to inform a client until such time as the member attempts to counsel the client as contemplated in Discussion paragraph [7]. In each situation, the member will have discharged properly the requirement under subparagraph (C)(2), and will not be subject to discipline.

[11] *Informing client that disclosure has been made; termination of the lawyer-client relationship.* When a member has revealed confidential information under paragraph (B), in all but extraordinary cases the relationship between member and client will have deteriorated so as to make the member's representation of the client impossible. Therefore, the member is required to seek to withdraw from the representation (see rule 3-700(B)), unless the member is able to obtain the client's informed consent to the member's continued representation. The member must inform the client of the fact of the member's disclosure unless the member has a compelling interest in not informing the client, such as to protect the member, the member's family or a third person from the risk of death or substantial bodily harm.

[12] *Other Consequences of the member's disclosure.* Depending upon the circumstances of a member's disclosure of confidential information, there may be other important issues that a member must address. For example, if a member will be called as a witness in the client's matter, then rule 5-210 should be considered. Similarly, the member should consider his or her duties of loyalty and competency (rule 3-110).

[13] *Other exceptions to confidentiality under California law.* Rule 3-100 is not intended to augment, diminish, or preclude reliance upon, any other exceptions to the duty to preserve the confidentiality of client information recognized under California law.

## *ATTACHMENT 2*

BILL NUMBER: AB 1101 CHAPTERED  
BILL TEXT

CHAPTER 765

FILED WITH SECRETARY OF STATE OCTOBER 11, 2003

APPROVED BY GOVERNOR OCTOBER 10, 2003

PASSED THE ASSEMBLY AUGUST 25, 2003

PASSED THE SENATE JULY 24, 2003

AMENDED IN SENATE JULY 10, 2003

AMENDED IN ASSEMBLY APRIL 10, 2003

INTRODUCED BY Assembly Member Steinberg  
(Principal coauthor: Assembly Member Pavley)  
(Coauthors: Assembly Members Diaz, Koretz, Lowenthal, and  
Strickland)  
(Coauthors: Senators Ducheny and Romero)

FEBRUARY 20, 2003

An act to amend Section 6068 of the Business and Professions Code,  
and to amend Section 956.5 of the Evidence Code, relating to  
attorneys.

### LEGISLATIVE COUNSEL'S DIGEST

AB 1101, Steinberg. Attorney-client confidences.

Existing law, the State Bar Act, provides for the licensing and regulation of attorneys by the State Bar of California. Existing law imposes various duties on an attorney, including the duty to maintain the confidences and preserve the secrets of his or her client at every peril to himself or herself.

This bill would authorize an attorney to reveal confidential information to the extent that the attorney reasonably believes disclosure is necessary to prevent a criminal act likely to result in death or substantial bodily harm to an individual.

Existing law, with certain exceptions, makes privileged any confidential communication between a lawyer and a client. Existing law provides an exception to the privilege if the lawyer reasonably believes that disclosure of a confidential communication is necessary

to prevent the client from committing a criminal act that the lawyer believes is likely to result in death or substantial bodily harm.

This bill would instead make the exception applicable if the lawyer reasonably believes disclosure is necessary to prevent any criminal act that the lawyer reasonably believes is likely to result in death or substantial bodily harm to an individual.

The provisions of the bill would become operative on July 1, 2004.

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. Section 6068 of the Business and Professions Code is amended to read:

6068. It is the duty of an attorney to do all of the following:

(a) To support the Constitution and laws of the United States and of this state.

(b) To maintain the respect due to the courts of justice and judicial officers.

(c) To counsel or maintain those actions, proceedings, or defenses only as appear to him or her legal or just, except the defense of a person charged with a public offense.

(d) To employ, for the purpose of maintaining the causes confided to him or her those means only as are consistent with truth, and never to seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law.

(e) (1) To maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client.

(2) Notwithstanding paragraph (1), an attorney may, but is not required to, reveal confidential information relating to the representation of a client to the extent that the attorney reasonably believes the disclosure is necessary to prevent a criminal act that the attorney reasonably believes is likely to result in death of, or substantial bodily harm to, an individual.

(f) To advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which he or she is charged.

(g) Not to encourage either the commencement or the continuance of an action or proceeding from any corrupt motive of passion or interest.

(h) Never to reject, for any consideration personal to himself or

herself, the cause of the defenseless or the oppressed.

(i) To cooperate and participate in any disciplinary investigation or other regulatory or disciplinary proceeding pending against himself or herself. However, this subdivision shall not be construed to deprive an attorney of any privilege guaranteed by the Fifth Amendment to the Constitution of the United States, or any other constitutional or statutory privileges. This subdivision shall not be construed to require an attorney to cooperate with a request that requires him or her to waive any constitutional or statutory privilege or to comply with a request for information or other matters within an unreasonable period of time in light of the time constraints of the attorney's practice. Any exercise by an attorney of any constitutional or statutory privilege shall not be used against the attorney in a regulatory or disciplinary proceeding against him or her.

(j) To comply with the requirements of Section 6002.1.

(k) To comply with all conditions attached to any disciplinary probation, including a probation imposed with the concurrence of the attorney.

(l) To keep all agreements made in lieu of disciplinary prosecution with the agency charged with attorney discipline.

(m) To respond promptly to reasonable status inquiries of clients and to keep clients reasonably informed of significant developments in matters with regard to which the attorney has agreed to provide legal services.

(n) To provide copies to the client of certain documents under time limits and as prescribed in a rule of professional conduct which the board shall adopt.

(o) To report to the agency charged with attorney discipline, in writing, within 30 days of the time the attorney has knowledge of any of the following:

(1) The filing of three or more lawsuits in a 12-month period against the attorney for malpractice or other wrongful conduct committed in a professional capacity.

(2) The entry of judgment against the attorney in a civil action for fraud, misrepresentation, breach of fiduciary duty, or gross negligence committed in a professional capacity.

(3) The imposition of judicial sanctions against the attorney, except for sanctions for failure to make discovery or monetary sanctions of less than one thousand dollars (\$1,000).

(4) The bringing of an indictment or information charging a felony against the attorney.

(5) The conviction of the attorney, including any verdict of guilty, or plea of guilty or no contest, of a felony, or a misdemeanor committed in the course of the practice of law, or in a manner in which a client of the attorney was the victim, or a necessary element of which, as determined by the statutory or common law definition of the misdemeanor, involves improper conduct of an attorney, including dishonesty or other moral turpitude, or an attempt or a conspiracy or solicitation of another to commit a felony or a misdemeanor of that type.

(6) The imposition of discipline against the attorney by a professional or occupational disciplinary agency or licensing board, whether in California or elsewhere.

(7) Reversal of judgment in a proceeding based in whole or in part upon misconduct, grossly incompetent representation, or willful misrepresentation by an attorney.

(8) As used in this subdivision, "against the attorney" includes claims and proceedings against any firm of attorneys for the practice of law in which the attorney was a partner at the time of the conduct complained of and any law corporation in which the attorney was a shareholder at the time of the conduct complained of unless the matter has to the attorney's knowledge already been reported by the law firm or corporation.

(9) The State Bar may develop a prescribed form for the making of reports required by this section, usage of which it may require by rule or regulation.

(10) This subdivision is only intended to provide that the failure to report as required herein may serve as a basis of discipline.

SEC. 2. Section 956.5 of the Evidence Code is amended to read:

956.5. There is no privilege under this article if the lawyer reasonably believes that disclosure of any confidential communication relating to representation of a client is necessary to prevent a criminal act that the lawyer reasonably believes is likely to result in death of, or substantial bodily harm to, an individual.

SEC. 3. (a) It is the intent of the Legislature that the President of the State Bar shall, upon consultation with the Supreme Court, appoint an advisory task force to study and make recommendations for a rule of professional conduct regarding professional responsibility issues related to the implementation of this act.

(b) The task force should consider the following issues:

(1) Whether an attorney must inform a client or a prospective client about the attorney's discretion to reveal the client's or prospective client's confidential information to the extent that the

attorney reasonably believes that the disclosure is necessary to prevent a criminal act that the attorney reasonably believes is likely to result in the death of, or substantial bodily harm to, an individual.

(2) Whether an attorney must attempt to dissuade the client from committing the perceived criminal conduct prior to revealing the client's confidential information, and how those conflicts might be avoided or minimized.

(3) Whether conflict-of-interest issues between the attorney and client arise once the attorney elects to disclose the client's confidential information, and how those conflicts might be avoided or minimized.

(4) Other similar issues that are directly related to the disclosure of confidential information permitted by this act.

(c) Members of the task force shall include the following:

(1) Civil and criminal law practitioners, including criminal defense practitioners.

(2) Representatives from the judicial, executive, and legislative branches.

(3) Representatives from the State Bar Commission for the Revision of the Rules of Professional Conduct and from the State Bar Committee on Professional Responsibility and Conduct.

(4) Public members.

SEC. 4. The provisions of this act shall become operative on July 1, 2004.



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